No. 10,355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY (a Massachusetts corporation),
Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and LELAND T. McCLEES,
Appellees.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLEES.

ANGUS M. TAYLOR, JR.,
United States Attorney, District of Hawaii,
Honolulu, T. H.,

EDWARD TOWSE,
Special Assistant to the United States Attorney, District of Hawaii,
Honolulu, T. H.,

Attorneys for Appellees.

Subject Index

Table of Authorities Cited

Codes and Statutes

No. 10,355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY (a Massachusetts corporation),
Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and LELAND T. McCLEES,
Appellees.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLEES.

STATEMENT AS TO JURISDICTION.

This is an appeal from an injunction proceeding brought by Liberty Mutual Insurance Company against Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, a claimant under the provisions of the Longshoremen's and Harbor Workers' Act of

March 4, 1927 (33 U. S. C. A. 921) and Act of August 16, 1941. (42 U. S. C. A., 1651-1654.) The provisions of the Longshoremen's and Harbor Workers' Act are made applicable to certain defense base workers outside the continental limits of the United States. By the Defense Bases Act, viz.:

AN ACT

"To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act', approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guan-

tanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife or child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future in-

stallments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any em-

ployment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941."

(42 U. S. C. A., 1651-1654.)

(Public Law 208—77th Congress; Chapter 357 1st Session; S. 1642.)

On August 5, 1942, the complaint, "Civil Action No. 477" was filed in the District Court of the United States for the Territory of Hawaii. (R. 12.) Subsequent thereto Deputy Commissioner Andrew R. Schmitz was succeeded by John C. Gray as Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District. On October 31, 1942, it was stipulated by and between the respective parties hereto that John C. Gray may be substituted as a party defendant for Andrew R. Schmitz. (R. 22.) The following allegation is set forth in paragraph I of the complaint (R. 6):

> "That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U. S. C. A., Secs. 1651-1654) (Defense-Bases Act), and particularly by reason of Section 1653 (b), reading as follows:
>
> 'Judicial proceedings provided under Sections 918 and 921 of Title 33 in respect to a compensation order made pursuant to Sections 1651-1654 of this title shall be instituted in the United States District Court of the Judicial district wherein is

located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs;'

"That in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended. (49 Stat. 921, 33 U. S. C. A., Sec. 921.)"

The complaint further alleges that the plaintiff at all times mentioned therein was a Massachusetts corporation, duly licensed to do an insurance business in the Territory of Hawaii (R. 7); sets forth the status and identity of the other plaintiffs; that Andrew R. Schmitz is the Deputy Commissioner for the Pacific Compensation District; that Leland T. McClees is a claimant under the Defense Bases Act (R. 8); and that the plaintiff, Liberty Mutual Insurance Company, at all times mentioned in the complaint was the compensation carrier for the other plaintiffs named therein. (R. 8.)

The Rules of Civil Procedure, Sec. 81 (a) 6, as amended by order of the Supreme Court made on December 28, 1939, to become effective on September 1, 1940, read as follows:

"(6) These rules do not apply to proceedings under the Act of September 13, 1888, C. 1015, Sec. 13 (25 Stat. 479) as amended, U. S. C., Title 8, Sec. 282, relating to deportation of Chinese;

they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, C. 509, Secs. 18, 21 (44 Stat. 1434, 1436), U. S. C. Title 33, Sec. 918, 921, except to the extent that matters of procedure are provided for in that Act."

This Court has jurisdiction of this appeal under and by virtue of 28 U. S. C. A., Section 225, subparagraph (a). Notice of appeal and bond were filed herein on January 2, 1943. (R. 97-98.)

SUMMARY OF PLEADINGS.

Paragraph V of the complaint alleges that in February of 1942, the Contractors (Contractors, Pacific Naval Air Bases, hereinafter referred to as the Contractors) employed the claimant Leland T. McClees, as truck driver at Kaneohe, which employment continued from February 26, 1942 until April 1, 1942 (R. 8); that as a part of the claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe, said Bird Farm Camp being maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942. (R. 8.)

Paragraphs VI, VII, VIII and IX of the complaint are as follows:

"VI.

That on or about April 15, 1942 claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a 'hitchhiker' by automobile to Honolulu; that on April 16, 1942 claimant was supposed to report back to work at Kaneohe but that he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck en route to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment." (R. 9.)

"VII.

That thereafter, to wit, on or about June 8, 1942, said claimant filed a claim with the defendant Andrew R. Schmitz as said Deputy Commissioner against said Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter, to wit, on June 11, 1942, a hearing was held in the offices of said Andrew R. Schmitz on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance Company; that the proceedings and testimony at said hearing are more particularly set

forth in the transcript of testimony of said hearing which will be produced at the hearing hereof and which is incorporated herein by reference." (R. 9-10.)

"VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit 'A' and incorporated in this Complaint by reference." (R. 10.)

"IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects: (9)

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that 'such transportation to work from Honolulu was available for employees other than those who lived at the Contractors' Hotel if they wished to use it' and that claimant 'was using a conveyance provided by the employer for such purposes' is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that

the accident occurred off the employer's premises; that the claimant at the time he sustained said injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be summoned to answer this Complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deed equitable and just." (R. 11-12.)

The answer of the Deputy Commissioner admits the allegations contained in paragraphs marked and numbered I, II, III, IV and VII of the complaint (R. 2); denies the allegations contained in paragraphs marked and numbered V and IX of the complaint (R. 23); admits that on April 17, 1942, the claimant sustained injuries while riding on a Honolulu Construction & Draying Company, Limited truck en route to Kaneohe, and that said injuries were sustained by virtue of a collision between the truck in which he was riding and another vehicle on Nuuanu Avenue in Honolulu, City and County of Honolulu, Territory of Hawaii,

said accident occurring at a point approximately twelve miles from his place of employment; and denies each and every other allegation in paragraph marked and numbered VI of the complaint (R. 23); admits that upon the completion of the hearing had before Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, that the said Andrew R. Schmitz made and entered an award of compensation to the claimant Leland T. McClees, a copy of which award is attached to said complaint marked Exhibit "A" and incorporated therein by reference, and denies each and every other allegation in paragraph marked and numbered VIII of the complaint. (R. 23.) Further answering the said complaint, the answer alleges that the award of compensation made by the said Andrew R. Schmitz to Leland T. McClees was made and entered fully in accordance with law; that the transcript of the testimony and transactions had before the said Deputy Commissioner and the exhibits produced before him amply, fully and completely justifies the findings of the said Deputy Commissioner and the award of compensation based thereon. The defendant further demands judgment against the plaintiffs dismissing the complaint together with costs and reimbursement of the action. (R. 23-24.)

The answer of the Deputy Commissioner denies and therefore places at issue all controversial allegations of the complaint.

STATEMENT OF THE CASE.

The appellees controvert the statement of the case set forth by the appellant, and in pursuance thereof submit the following statement.

The claimant, Leland T. McClees, was employed by the Contractors on or about January 20, 1942, to work at the Kaneohe Base, at Kaneohe, Island of Oahu. (R. 58-59.) At the time of his employment and up to a short period of time prior to the accident in question, the claimant resided and lived at the Contractors Hotel on North King Street, in the City of Honolulu. (R. 60.) During this period and while the claimant resided and lived at the Contractors Hotel in Honolulu, he was, together with other employees of the Contractors furnished daily transportation by truck from the City of Honolulu to the Kaneohe Base. This daily transportation to the Kaneohe work site was furnished free of charge to the employees. The Contractors for reasons not explained herein, hired and employed an independent local trucking and draying concern, the Honolulu Construction & Draying Company, Limited to furnish this daily transportation of its employees from the Contractors Hotel in Honolulu, to Kaneohe Base, a distance of approximately seventeen or eighteen miles. On or about April 10, 1942, the claimant moved from the Contractors Hotel at Honolulu to the Bird Farm Camp, a camp maintained by his employers and situated approximately one mile from his place of employment at the Kaneohe Base. (R. 60.) Upon moving to his new quarters at the Bird Farm Camp, the claimant continued to be transported

to the Kaneohe Base by truck transportation facilities furnished by his employers. When the claimant lived at the Contractors Hotel in Honolulu, he was transported from the hotel to his daily work in one of two automobile trucks supplied by the Contractors as aforesaid, for the express purpose of transporting their employees who resided in Honolulu, free of charge, from Honolulu to their work sites.

On April 15, 1942, the claimant, at his request, was permitted a "day off" by his foreman. Due to the nature of the claimant's occupation and the essential nature of his work and other related pending projects, employees were permitted a "day off", one day out of seven, for the purpose of attending to necessary personal affairs, entertainment and recreation. (R. 69.) On April 15, 1942, claimant having been granted his "day off" came to the City of Honolulu from the Bird Farm Camp at Kaneohe. From the morning of April 15, 1942, until the inception of his return trip to the Bird Farm Camp from Honolulu, the claimant had no contact with his employers or its agents. After remaining in the City of Honolulu on April 15 and April 16, 1942, the claimant, in pursuance of the practice employed by his employers of transporting their employees from Honolulu to the Kaneohe Base, presented himself on the morning of April 17, 1942, attired in his working clothes at the designated place where the truck transportation supplied by his employers picked up the workmen for transportation from the City of Honolulu to the Kaneohe Base. The claimant, after exchanging salutations with the driver

of the truck, took a seat in the truck along with other workmen designated for the Kaneohe Base. After traveling some distance upon the main thoroughfare from the City of Honolulu to the Kaneohe Base, the truck in which the claimant was a passenger, was side-swiped by a dairy truck traveling in the opposite direction. As a direct result of the collision, the claimant suffered a serious injury to his left arm.

Other testimony of the claimant Leland T. McClees, had at the hearing before the Commissioner. (R. 57-78) discloses the following pertinent facts relative to the appellees' contentions in this appeal. That the claimant was required by his employers to reside and live at the Bird Farm Camp at Kaneohe. (R. 59.) With reference to the transportation supplied from the Contractors Hotel in the City of Honolulu to Kaneohe, that the trucks used in the transportation came to the hotel and that there were two designated trucks used for the transportation from Honolulu to the Kaneohe Base which fact the defendant well knew, having ridden upon the same truck "all the time" on the trip to Kaneohe Base prior to his living at the Bird Farm Camp. The truck had the same driver. (R. 60.) That on the morning of the accident, April 17, 1942, the defendant "picked up" the truck from a friend's house where he had stayed over night (R. 61) and that he knew that there should be a Honolulu Construction & Draying Company, Limited truck carrying Contractors' employees passing by the stop where he got on the truck. (R. 65.) Further, on the morning in question,

the claimant was attired in his work clothes, thus enabling him to proceed directly from the City of Honolulu to the work site at the Kaneohe Base without the necessity of having to stop at the Bird Farm Camp that morning for the purpose of changing his clothes. (R. 74-75.)

SUMMARY OF ARGUMENT.

The following principles of the Longshoremen's and Harbor Workers' Compensation Act are applicable to the appellees' case and may be summarized under the following headings:

I. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 901 et seq.), should be liberally construed in favor of the injured employee.

II. In the absence of substantial evidence to the contrary, the presumption is "that the claim comes within the provisions of this act"; section 20 (a) of the Longshoremen's and Harbor Workers' Compensation Act.

III. The burden is upon the appellant to show that there was no evidence before the Deputy Commissioner to support the compensation order complained of in the Bill.

IV. The findings of fact of the Deputy Commissioner supported by evidence as in the instant case should be regarded as final and conclusive and not subject to judicial review.

V. That the injury sustained by the claimant was an injury arising out of and in the course of employment.

The subject matter of the foregoing categories are treated in the following argument in conjunction with the appellees' contention regarding the principle issue involved in this appeal, to wit: Whether or not the claimant's injury arose out of and in the course of his employment.

ARGUMENT.

The principal question involved in this appeal, is "Whether the evidence supports the finding of fact of the Deputy Commissioner that the claimant's injury arose out of and in the course of his employment."

Appellant contends, among other things, that since the claimant was injured while on his way to the locus of his employment, that the injury did not therefore arise out of and in the course of his employment.

When compensation acts were first enacted, the courts construed the phrase "arising out of and in the course of employment" strictly and literally, and no injury was considered compensable unless it in fact arose during actual working hours and while the employee was actually engaged in his work at his place of employment. The courts, however, realized that such a strict interpretation of the compensation

laws did not tend to achieve the purposes or intent of the compensation acts. The courts, as a result of this, eventually came to the conclusion as evidenced by a review of the early compensation decisions, that an employee may still be "employed" despite the fact that his physical or manual work had ceased for the time being or had not in fact commenced, and that the mere fact that an injury befell an employee at a time when he was not actually performing labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Company,* 288 U. S., 162, 169, the Supreme Court said:

> "* * * The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Parramore,* 263 U. S. 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall com-

> mence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

In the *Voehl* case, supra, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question whether the employee's injury arose out of and in the course of his employment should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of his work, arose out of and in the course of employment. *Swanson v. Latham,* 90 Conn. 87, 101 Atl. 492; *Larke v. Hancock Mutual Life Insurance Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *Cudahy Packing Co. v. Industrial Insurance Commission of Utah,* 60 Utah 161, 207 Pac. 148, 28 A. L. R. 1394; *Lumber Reciprocal Association v. Behnken,* 112 Texas 103, 246 S. W. 72, 28 A. L. R. 1402; *Lamm v. Silver Falls Timber Co.,* 133 Ore. 468, 286 Pac. 527; *Litler v. Fuller Co.,* 223 N. Y. 369, 119 N. E. 554.

The question of compensable injuries sustained outside of the actual working hours of an employee arises most frequently where the employee is being

transported to or from the situs of his work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated in the *Voehl* case, supra, "no exact formula can be laid down which will automatically solve every case." But a review of recent cases involving that question, will indicate the circumstances and factors which the courts considered of paramount importance in determining the question.

In *Smith v. Industrial Accident Commission,* 18 C. (2d) 843, 118 Pac. (2d) 6, the employee was working on Treasure Island which was the site of the World's Fair in San Francisco. At the end of the day's work he boarded a truck owned by the employer and rode along the roads of the exposition grounds towards the terminal where he was to board a boat; on the way he was injured. The court held that the custom of the employees of riding this truck coupled with the fact that the roads traveled were part of the employer's premises, were important facts to be considered in connection with the question whether the employee left the employment when he boarded the truck. The court held that when transportation is furnished by the employer to convey a workman to and from his place of work as an incident of the employment, and the means of transportation are under the control of the employer, an injury sustained during transportation arises out of and in the course of employment.

In the case of *Southern States Mfg. Co. v. Wright,* 146 Fla. 29, 200 So. 375, the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

> "Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between employer and employee, express or implied, covering the matter of transportation to and from work. * * *
>
> "So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there,* arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was *an incident to the employment and was exercised in the furtherance of the employment.*" (Italics ours.)

In the case of *Fritzmeier v. Texas Employers' Ins. Ass'n.,* 131 Tex. 165, 114 S. W. (2d) 236, the employee was hired as a tank builder on a job several miles distant from Gladewater. He did not live where the work was being performed. The employee resided at Gladewater, and rode each morning and back each

evening with a truck driver in charge of the truck being used on the job. The employee and others were instructed to meet at a designated place at Gladewater in order to ride the truck and reach work on time. Fritzmeier was injured while enroute to the place of work.

The court affirmed an award of compensation under the foregoing facts, stating that the transportation was connected with the employment and that, even though the employer had not assumed the obligation of transporting the employee and his co-laborers, yet it knew of the arrangement followed and plainly recognized the necessity of the method of transportation.

In the case of *Lee v. Fish et al.,* 16 N. J. M. 63, 196 Atl. 662, decedent was in the employ of the respondent as a helper in his business as a wholesaler grocer. On the day in question, as was his custom, he boarded the truck of his employer preparatory to being taken home after the course of the day's business. The truck was operated by the respondent's brother, who was the manager of the respondent's business. Decedent lived on the route between the employer's place of business and the garage where the truck was garaged. It was the custom of the employer, through his brother, to go for the decedent regularly on Sundays and take him to the respondent's place of business in order to aid the respondent in opening his business on time; this with the knowledge and acquiescence of the employer over a long period of time. Affirming an

award of compensation made for fatal injuries sustained by deceased enroute home, the court said:

> "I am satisfied that *the furnishing of the said transportation by the employer was grounded in the mutual convenience and advantage of both the employer and employee. They engaged in this practice until the same ripened into custom.* It is clear that *the furnishing of the said transportation was for the benefit of both parties.* I feel that the same comes clearly within the rule established and so well expressed in the cases of Rubeo v. McMullen Co., 117 N.J.L. 574, 189 A. 662; 118 N.J.L. 530, 193 A. 797; Salomone v. Ansetta, N.J. Sup., 194 A. 798, and Alberta Contracting Corporation v. Santomassimo, 107 N.J.L. 7, 150 A. 830.
>
> "'*The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work,* by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment.'
>
> Alberta Contracting Corporation v. Santomassimo, supra." (Italics ours.)

In the case of *George Taylor v. M. A. Gammino Construction Company, et al.,* 127 Conn. 528, 18 Atl. (2d) 400, the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck to ride home in.

The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The Court in affirming the award of compensation, said:

> "An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;* to do this it is not necessary that the employer should authorize the use of a particular means or method,—although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Italics ours.)

In the case of *Chrysler v. Blue Arrow Transport Lines,* 295 Mich. 606, 295 N. W. 331, the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured enroute. The question was whether his injury was sustained in

the course of his employment. The Court, affirming an award to the employee, stated:

> "Solution of the problem in the present case is aided by the test suggested in the Konopka case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances,* there is either an express or implied undertaking by the employer to provide the transportation'. In the case before us there was a clear undertaking on the part of the employer to furnish week-end transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town." (Italics ours.)

In the case of *Rubeo v. Arthur McMullen Co.,* 118 N. J. L. 530, 193 Atl. 797, the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the Court said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delimitation is not so finely drawn. The provision of transportation, if not the subject of an ex-

press or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties,* at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would thereby be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction, of the employer, *into a practice grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for." (Italics ours.)

In *William Venho v. Ostrander Railway & Timber Company, et al.,* 185 Wash. 138, 52 Pac. (2d) 1267, plaintiff brought an action to recover damages for personal injuries sustained while riding a logging train from defendant's lumber camp to town. For about two weeks prior thereto, he had been employed in the woods as a "faller", but had ceased to work as such the evening before the accident, and, at the time he was injured, was on his way out from the camp

to Ostrander. He alleged in his complaint that it was the custom of logging companies to transport employees on their logging trains to and from their camps. In order to support its contention that the sole remedy of the employee was under the compensation law, the defendant, Ostrander Railway & Timber Company, pleaded affirmatively that plaintiff was injured "in the course of his employment", and that he was entitled to relief under the workmen's compensation law. The question in the case was: Was plaintiff, at the time of his injuries, "in the course of his employment"? In deciding that he was, the Court said:

> "It is the general rule (to which this court adheres) that a workman injured going to or coming from the place of work is not 'in the course of his employment'. There is an exception, however, as well established as the rule itself. The exception, which is supported by overwhelming majority, is this: When a workman is so injured, while being transported in a vehicle furnished by his employer *as an incident of the employment,* he is within 'the course of his employment', as contemplated by the act. In other words, when the vehicle is supplied by the employer for *the mutual benefit of himself and the workman* to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor.
>
> "This exception to the rule may arise either as the result of *custom or contract, express or implied.* It may be implied from the *nature and*

circumstances of the employment and the custom of the employer to furnish transportation." (Italics ours.)

In the case of *Johnson v. Thompson Sterrett Co.,* 174 Ga. 656, 157 S. E. 363, which involved an injury to an employee who was being transported home from work, the Court said:

> "Where it is the custom of an employer to transport employees to and from work, and the employees, with the knowledge and consent of the employer, use a truck furnished or designated by the employer for this purpose, the inference is authorized that the transportation of the employees, whether expressly a part of the contract or not, is one of the incidents of the employment, and where one of the employees, while being so transported, is injured by falling or jumping from the moving truck, the inference is authorized that the injury arises out of and in the course of employment. Daniel Donovan's case, 217 Mass. 76, 104 N.E. 431, Ann. Cas. 1915C, 778."

In the case of *Alberta Contracting Corporation v. Santomassimo,* 150 Atl. 830 (N. J. 1930), the employee was injured while riding home on a truck from the stone quarry where he worked which was thirteen miles from the town where he lived. There was no express agreement that the employee should adopt that method of transportation but for several months the employees had used that method with the knowledge and acquiescence of the employer. On an appeal

from an award of compensation made in the case, the Court said:

> "The court below found, and we think rightly, that decedent's death arose out of and in the course of his employment. It was argued below, and is argued here, that such finding was erroneous because the decedent 'was not engaged in his employment' while on his way to work.
>
> "The case at bar is one of an obligation to be implied from the conduct of the employer, and is much like the case of Saba v. Pioneer Contracting Co., 103 Conn. 559, 131 Atl. 394.
>
> "We believe that the pertinent rule to be extracted from the cases is this: The relation of employer and employee continues while the employee is riding to and from his employer's premises, in a truck used in connection with his employer's work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment. See Cicalese v. Lehigh Valley Railroad Co., 75 N.J. Law, 897, 69 A. 166; Depue v. Salmon Co., 92 N.J. Law, 550, 106 A. 379; Dunbaden v. Castles Ice Cream Co., 103 N.J. Law, 427, 135 A. 886; Bolos v. Trenton Fire Clay — Porcelain Co., 102 N.J. Law 479, 133 A. 764, affirmed 103 N.J. Law, 483, 135 A. 915.
>
> * * * Whether the truck upon which decedent rode when injured was owned by the employer is immaterial, * * *. The employer did not specifically contract with the decedent to transport him, but assumed the obligation to do so by direct-

ing the decedent and other employees to ride on the trucks, and by knowledge of and acquiescence in the continued practice of the workmen so to ride for a period of sixteen months and until the accident in question."

The case of *Lamm v. Silver Falls Timber Co.,* 133 Ore. 468, 286 Pac. 527, involves facts similar to those in the instant case. The court in that case analyzed and classified the various leading cases having to do with injuries sustained by employees while they were not actually working. The review is quite comprehensive. In view of the similarity of facts and the clarity of the opinion we quote extensively therefrom:

"The plaintiff, after having been in the employ of the defendant for many months, engaged in logging operations, concluded to return to his home in Silverton on Saturday, November 6, 1926, for a short visit; apparently he had no specific objective in mind which he had determined to accomplish during his absence from the defendant's camp. It is clear that neither he nor the defendant had any thought of terminating the plaintiff's employment, and that he expected to shortly return and resume his labors. Thus he retained his bunk house; his blankets, personal belongings, etc., remained in it at the defendant's camp, and in fact when he concluded his labors on Friday, the circumstances were no different than when he quit his work on any other day with the exception that he did not expect to resume his task the following Monday. On Tuesday, November 9th, the plaintiff decided to return so that he could again resume his work on Wednesday

morning, November 10th; such being his plan, he presented himself at the Silverton terminus of defendant's logging railroad and spoke to an employee in charge of the logging train which was about to start for the camp. He was accepted aboard the train, and in harmony with the uniform practice was charged no fare. This, together with the statement of facts contained in the previous decision which is reported in 277 P. 91, will suffice for the purpose of setting forth the relationship between the parties. It may be useful, however, to remind ourselves of a few facts concerning logging camps which are well known. Work in these camps is distinguishable from that in the factory in the important fact that the logger's employment is discharged at a place which is far removed from his home, places of recreation, and facilities for supplying his wants. * * * While the logger is staying at the camp with its bunk houses, limited boarding accommodations, and meager facilities for supplying the wants of life, he finds frequent occasion to quit work for short periods of time and visit the city. These temporary cessations from labor are due to the nature of the logging camp and the kind of work in which the men are engaged; * * *."

"From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ. His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously. Hence the employment continued not

only while he was working for the defendant in the woods, but also upon his trip to Silverton and back.

"We come now to the more specific question, whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these acts seek to serve leave no room for narrow technical constructions. * * *"

"One of the purposes of the Workmen's Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. Stark v. State Industrial Accident Commission, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in Wirta v. North Butte Mining

Co., 64 Mont. 279, 210 P. 332, 355, 30 A. L. R. 964: 'The word "employment", as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee."

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours. * * *"

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter. * * *"

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Acts is to grant compensation to an

injured workman on account of his status. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation. The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of and in the course of his employment', but bore in mind this general purpose of the act, as revealed by its entire text. * * *"

"The next group of cases which we shall review may be preceded by the following quotation from Wells v. Clark & Wilson Lumber Co., supra: 'Numerous authorities are cited by appellant to the effect that an employee going to or returning from his work or going to the place where he is employed to perform labor is "acting in the course of his employment", and is subject to the provisions of the Workmen's Compensation Act. This is sound law.'

"In the cases of the type adverted to by the above quotation, the employee was held entitled to the benefit of the act whenever his relationship to the industry subjected him to its hazards in a greater degree than an ordinary member of the public. It will be observed, as we proceed, that the mere fact that the morning whistle had not blown was immaterial; likewise, no controlling significance was attached to the fact that the ac-

cident occurred upon a public street, and that the tort-feasor was a third party. The rule expressed in Wells v. Clark & Wilson Lumber Co. is general. The cases which it suggests may be more specifically classified as follows: (1) An employee upon whom an injury is inflicted, while being conveyed to or from his work in a conveyance furnished by his employer as an incident of the contract of employment, is generally held entitled to compensation. * * *" (and numerous authorities cited therein.)

"Applying the analogy of the foregoing cases, and the principles which we have endeavored to deduce from them, the conclusion comes irresistibly that, although the plaintiff's work would not resume until Wednesday morning, the employment began several months previously and continued during the trip from Silverton. Transportation to and from plaintiff's work upon these occasional trips *was incidental to his employment, hence, the employment continued during the transportation in the same way as during the work.* The injury, occurring during transportation, took place within the period of his employment, and at a place where he had a right to be, and while he was doing something incidental to his employment, because rendered necessary by the peculiar circumstances attendant upon logging operations." (Italics ours.)

In the instant case a review of the evidence reveals a state of facts which brings the question raised by this appeal conclusively within the principles enumerated in the foregoing authorities. The claim-

ant's journey to and from the City of Honolulu to and from the Bird Farm Camp was incidental to his employment. The trip which the claimant made to Honolulu was clearly within the contemplation of the employer and the employee in view of the fact that the situs of the employee's work was at a point some seventeen to eighteen miles distant from the City of Honolulu, which distance made it necessary for the employee to take occasional trips to town in order to attend to his personal affairs and business, and to seek recreation or other pleasure. The transportation furnished by the employer in the instant case for the transportation of its employees between the City of Honolulu and the situs of the job, was furnished before and continued even after establishment of the labor camp. It appears from the evidence that no rule, notice or regulation, whatsoever, specifically limiting the use of the transportation furnished by the employers was in effect or brought to the notice of the employees.

At the time of the accident the claimant was, as a matter of law, in the employ of the Contractors, Pacific Naval Air Bases. He apparently continued on the payroll of the company during his trip to town and his return therefrom, and both he and his employer understood that, after the temporary cessation of work during the period of his trip to the City of Honolulu that he would again resume his duties. It was therefore his status as an employee of the Contractors which accorded him every right and opportunity, when, on the morning of the accident, and at-

tired in his working clothes he boarded the truck furnished by his employer on his way to the locus of his work. The furnishing of the transportation by the employer was for the mutual benefit of the employer and employee.

Upon the question "that the accident arose from the common peril from which the public generally was exposed", referred to as the "Commonalty Doctrine", appellant contends it is necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general is subjected, the following authority conclusively discloses that the doctrine, if in fact it was at any time recognized as such, has been specifically rejected. In the case of *Baltimore and Ohio R. R. Co. v. Clarke, Deputy Commissioner,* 59 F. (2d) 595, the court said:

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of and in the course of employment,' 33 U. S. C. A. Sec. 902. It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute. A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may

not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter."

The doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, Deputy Commissioner,* 62 F. (2d) 468, which arose under the Longshoremen's Act as applied in the District of Columbia. The Court in that case said:

> "In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not 'arise out of' the workmen's employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned.*" (Italics ours.)

In the case of *Aetna Life Insurance Company v. Hoage, Deputy Commissioner, et al.,* 63 F. (2d) 818, the appellant attempted to invoke the old "Commonalty Doctrine" in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general, the same argument which plaintiffs may advance in the present case. In the Aetna Life Insurance Company case the court definitely re-affirmed the position previously taken in the *New Amsterdam Casualty Company* case, supra, by holding that:

> "* * * Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk. * * *"

The case of *Katz v. Kadans & Co. et al.,* 232 N. Y. 420, 134 N. E. 330, further nullifies the application of the "Commonalty Doctrine" wherein the court specifically states:

> "* * * But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. The question is whether the employment exposed the workman to the risks by sending him onto the street, common though such risks were to all on the street."

CONCLUSION.

The appellees respectfully submit that in view of the authorities and argument pertaining thereto hereinabove set forth, that the injury sustained by the claimant Leland T. McClees, arose out of and in the course of his employment with the Contractors, and it is further respectfully submitted that the judgment of the District Court should be affirmed.

Dated, Honolulu, T. H.,
May 14, 1943.

ANGUS M. TAYLOR, JR.,
United States Attorney, District of Hawaii,
EDWARD TOWSE,
Special Assistant to the United States Attorney, District of Hawaii,
Attorneys for Appellees.